IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1137

RANDALL CHARLES HAUSER,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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January 16, 1979

I N D E X

CITATIONS

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RANDALL CHARLES HAUSER,

PETITIONER,

v.

THE STATE OF WASHINGTON,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Petitioner, Randall Charles Hauser, respectfully prays that a writ of certiorari issue to review the Notation Order of the Supreme Court of the State of Washington denying Petition for Review, entered October 20, 1978.

OPINION BELOW

The Court of Appeals of the State of Washington entered its opinion on March 16, 1978, and the Washington State Supreme Court denied the Petition for Review on October 20, 1978, and this matter became final in Washington state and review was terminated on October 23, 1978. A copy of the opinion, affirming the judgment of conviction appears in the Appendix hereto and is reported at 19 Wn. App. 506 (1978). This case involves a state court which has decided a federal constitutional question, and this Court's jurisdiction is envoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was an illegal search based upon a search warrant supported by an inadequate or insufficient affidavit.

2. Whether an item (a suitcase) not mentioned in the search warrant was properly seized and admitted into evidence.

3. Whether at the time of trial several irregularities and incidents combined to deny the defendant the essentials of substantive due process under the Fourteenth Amendment to the United State Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Fourth Amendment
U. S. Constitution, Sixth Amendment
U. S. Constitution, Fourteenth Amendment

STATEMENT OF THE CASE

The defendant is appealing from his conviction of possession of more than 40 grams of marijuana with intent to deliver under Washington State statutes. Judgment and sentence committing defendant to prison for up to five years were entered by the trial court on June 11, 1976. In doing so, the trial court rejected the recommendation of the prosecutor that defendant be placed

on probation. Charges were filed against the defendant on February 5, 1975, and the trial on that charge was held between May 23 and May 27, 1975 resulting in a jury verdict of guilty.

Prior to May 2, 1975, the defendant was represented by a Yakima County public defender. Present defense counsel was retained by the defendant on May 1, 1975, and was substituted as counsel on May 2, 1975, three days before the matter was scheduled to go to trial on May 5, 1975. On the day of substitution of counsel, a continuance was granted to the defendant from May 5, 1975 to May 19, 1975 to allow some time to new counsel in preparing for trial. Defense counsel requested another continuance on May 16, 1975, for purposes of further investigation and preparation for trial, but that request was denied. This motion for continuance was renewed again on the morning of commencement

of trial, May 26, 1975, and that motion was again denied.

The Yakima County Prosecutor had previously asked for a continuance of the trial in this matter from March 26, 1975, to May 5, 1975, and that continuance was granted by the court.

On March 7, 1975, the trial court heard a pre-trial motion to suppress the suitcases and marijuana contained therein, and that motion was denied and Findings of Fact and Conclusions of Law were entered on May 2, 1975. At this hearing on motion to suppress, the public defender moved the court for leave to have out-of-state subpoenas served on Tucson, Arizona airport personnel compelling attendance at the hearing on suppression. This motion was denied by the Honorable Bruce P. Hanson, Yakima Superior Court Judge.

This motion to suppress was made again at the beginning of trial, at the end of the trial and in the post-trial for a new trial.

The following are the essential facts of the case. On the morning of February 4, 1975, a young man by the name of Kevin Hrvatin boarded a Hughes Airwest Airplane in Yakima, Washington and flew to Tucson, Arizona, with two empty or very light suitcases in his possession. Mr. Hrvatin arrived in Tucson at about 3:00 p.m., met a man who took Mr. Hrvatin's two empty suitcases and gave Mr. Hrvatin two full suitcases which he took with him on his return to Yakima by the same airlines that evening at about 9:00 p.m., February 4, 1975. Upon his return to Yakima, Mr. Hrvatin went to get the two suitcases, whereupon he was arrested by Yakima Police Officers, taken to a room at the airport and the luggage he was carrying

was opened and searched by the officers.

Mr. Hrvatin testified that he went to Tucson to pick up the two suitcases at the request of and at the expense of the defendant. Other than the testimony of the Yakima officers regarding what they found in the suitcases after the suitcases were opened and searched, the only testimony of record regarding the contents or knowledge of contents of the suitcases was that of Mr. Hrvatin when he stated that the defendant told him that "leather and jewelry" would be in the suitcases. While there is testimony that the defendant was in the airport terminal on that evening, there is no testimony that he ever had the suitcases involved in his possession. However, although the Yakima police officers showed no interest in the defendant, an airport security guard, Joel A. Guiterrez, who had been advised in advance of the intended seizure, saw

the defendant near the entrance to the airport terminal and chased after him outside the terminal firing several gunshots toward the rear of the defendant's vehicle as the defendant was leaving. This all took place while the Yakima police officers had Mr. Hrvatin and a young lady by the name of Betty Ballard under arrest inside the terminal. The defendant was arrested early the following morning. The defendant did not testify at trial.

The following is the record regarding search and seizure of the suitcases and marijuana contained therein. The search warrant and affidavit for search warrant were introduced into evidence and are lodged with the Clerk for inspection.

The search documents, Findings of Fact and Conclusions of Law on the Suppression Hearing, and the Suppression Hearing Verbatim Record referred to above, in addi-

tion to the testimony at trial, indicate the following significant facts on the search and seizure:

1. The search warrant was issued on February 4, 1975, by the Honorable A. John Nicholson, Yakima County District Court Judge, permitting the search and seizure of the following property only:
"a black Samsonite suitcase bearing Hughes Air West luggage tag Number 03-62-52, which will arrive at the Yakima airport at approximately 9:06 P.M. on Feb. 4, 1975 2-1/2 feet long, 6 inches thick, and 18 inches high. It contains no identification except the above-mentioned tag number". (See Search Warrant, lodged with the Clerk.)
2. The entire factual basis for issuing the search warrant as contained in the affidavit of

Yakima Police Officer Vern Riddle was that he was called long distance by an airport security guard from Tucson, Arizona, named Lester Brown, who told him that he saw talcum powder coming from the cracks of the suitcase involved, that the suitcase weighed about 40 pounds and that it did not appear to contain clothes, and that it appeared to contain a solid object, and that talcum is used to distract dogs from smelling marijuana.

3. In the search warrant affidavit, affiant stated that "your affiant <u>believes that he has probable cause to believe that</u>" marijuana was in the suitcase (emphasis added.).
4. The second suitcase in the possession of Mr. Hrvatin was seized and searched without a warrant. This suitcase was locked and was opened

by a Yakima police officer by use of a screwdriver.

5. It is undisputed that the suitcase upon which the warrant was based was locked when it was placed into the custody of airport personnel in Tucson and was unlocked when it arrived at the Yakima airport.

6. The testimony outlined immediately above in numbers 4 and 5 also make it clear that it was the suitcase subject to the warrant which had been unlocked before arrival in Yakima and not the other suitcase of which the officers were unaware until the suitcases arrived in Yakima.

7. The Yakima police were not on a mere searching expedition when they arrived at the YakimaAirport. Three plain clothes officers went to inspect the bags and make the

arrest. A stake-out officer was requested to remain outside with a police car. All this was done merely because some talcum powder was seen and smelled in Tucson and the bag was heavy and "appeared" not to contain clothing.

8. Airport Security Guard, Joel Guitterez chased the defendant and shot several shots after him from his revolver although he had never seen the suitcases or the materials the suitcases contained prior to his chase and shooting. On cross examination, Mr. Guitterez was asked whether he would have chased the defendant and shot at him without knowing that there was marijuana in the bags. His response was, "I was confident, sir." He was then asked, "You were confident there was marijuana in the bags?" His response

was, "Yes."

9. Although Officer Marion Baugher of the Yakima Police Department had been assigned to the Narcotics Unit for at least six months prior to the suppression hearing of March 7, 1975 and had worked prior to that time as an assistant to narcotics agents for some time, he had had no personal experience with dogs sniffing out marijuana or smelling marijuana and had never had access to or the use of a dog in assisting with an investigation for the discovery of marijuana or other narcotics.

Following the denied motion of the public defender to subpoena Tucson witnesses to the suppression hearing for the purpose of arriving at the truth behind the search and seizure, defense counsel in its several motions for continuance, made offers of proof to the trial court

regarding what the evidence would show if such witnesses were placed under oath. Further offers of proof were made to the court at the time of argument on the motion for a new trial.

REASONS FOR GRANTING THE WRIT

1. Similar U. S. Courts of Appeals' decisions are in conflict and there has been no decision on the issue of whether a substance as innocent appearing as baby powder or talcum powder is sufficient basis for the issuance of a search warrant to search a suitcase for the presence of marijuana.

The Petitioner contends that the Fourth Amendment to the United States Constitution should prohibit people from being subject to having their property searched and seized purely because an official sees baby powder on the outside of a suitcase.

This Court, in U. S. v. Chadwick,

433 U. S. 1, 53 L. Ed. 2d, 538, 97 S. Ct. 2476 (1977), discussed the question of leaking talcum powder as a commonly understood basis for suspecting the presence of marijuana in a trunk or other baggage. The discussion was dicta and the admission of the marijuana into evidence in the lower court was reversed on other grounds.

Likewise, in the U. S. v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974), although this issue was not decided upon, the Court there pointed out that the defendant conceded probable cause when a border patrolman confirmed the common use of talcum powder to disguise the presence of marijuana.

Two conflicting U. S. Courts of Appeals cases have come down with holdings on the question of whether or not a search is justified purely because an official has smelled marijuana which was inside a suit-

case at the time the material was smelled. The case of U. S. v. Astrof, 556 F.2d 1369 (1977), involving a suitcase going between Tucson, Arizona and Texas, held that smelling marijuana through the suitcase was not enough to justify a search and the marijuana was suppressed from evidence. The case of U. S. v. Pond, 523 F.2d 210 (1975), involving the transportation of a suitcase between San Diego and New York, held that smelling the marijuana through the suitcase was enough to justify a search warrant. Parenthetically, it should be pointed out that in the Pond case a third suitcase was suppressed from evidence because that suitcase was not identified in the affidavit in support of the search warrant. See footnote 2 at the bottom of page 212 of the Pond case.

"Innocent seeming activity and data" was held by Spinelli v. U. S., 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584

(1969), to be insufficient information to amount to probable cause for issuance of a search warrant.

If the affidavit in support of a request for a search warrant contains none of the underlying facts or circumstances from which a magistrate can find probable cause to believe a crime is being committed or about to be committed, then the search warrant issued pursuant to that affidavit is not sufficient, and evidence uncovered as the result of the search from that warrant is not admissible. Suspicion, belief and guess alone are not enough. The affidavit must contain more than a mere declaration of suspicion and belief. Spinelli v. United States, 393 U.S. 410, 21 L. Ed 2d 637, 89 S. Ct. 485 (1969); Aguilar v. Texas, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964); State v. Patterson, 83 Wn.2d 49, 515 P.2d 496 (1973); State v. White, 10 Wn. App 273,

518 P.2d 245 (1973); State v. Spencer, 9 Wn. App. 95, 510 P.2d 833 (1973); State v. Harrison, 5 Wn. App. 454, 488 P.2d 532 (1971).

2. The decision of the Supreme Court of the State of Washington is inconsistent with the United States Supreme Court decisions interpreting search and seizure issues and the denial of substantive due process under the Fourteenth Amendment to the United States Constitution.

In the instant case, a suitcase not particularly described or mentioned in any way whatever was seized and searched and admitted into evidence.

The Petitioner submits that the prohibition of the Fourth Amendment of the United States Constitution against unreasonable searches and seizures commands a rigid enforcement of the plain language of that Amendment requiring that the

thing to be seized and searched must be particularly described.

Whether the particular object desired to be seized is not described in the warrant because of police deceit or through oversight, mistake or carelessness, should be of no consequence. The unavoidable result is that the warrant does not describe with particularity the things to be seized. Coolidge v. New Hampshire, 403 U. S. 443, 471, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971); U. S. v. Carignan, 286 F. Supp. 284 (D. Mass. 1967); King v. U. S., 282 F. 2d 398 (4th Cir. 1960).

In addition to other irregularities at the trial level, the Petitioner contends that he was denied of substantive due process because of the court's refusal to allow compulsory process under both the Sixth Amendment and Fourteenth Amendment to the United States Constitution. The Petitioner's indigence at the time of the

suppression hearing when compulsory process was needed for an effective defense makes the denial of those motions even more significant, especially in view of the decision of the trial court that it should adhere to the decision already made by the suppression hearing judge at the time when this Petitioner was indicent.

CONCLUSION

If the private property of a United States citizen can be searched because the police detect the presence of baby powder on the outside of that property, then counsel submits that the law enforcement in this country no longer needs any basis of any substance for searching what they choose to search, and this Court's prior rulings requiring more than "innocent appearing data or paraphernalia" no longer have real significance. In addition, Petitioner submits that the presence of talcum powder makes for a

much weaker case for search than the ability of an official to smell the actual marijuana through a suitcase. Yet, one of our Courts of Appeals held that smelling the marijuana was not enough to justify the search.

Regardless of the guilt or innocence of the individual involved, we should retain at least some safeguards against unreasonable searches and seizures and should require more than the presence of baby powder to justify a search.

Respectfully submitted,

LAWRENCE L. SHAFER
Counsel for Petitioner

January 16, 1979

19 Wn App 526

APPENDIX

IN THE COURT OF APPEALS OF THE

STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RANDALL CHARLES HAUSER, Appellant.	NO. 2038-III Division Three Filed: March 16, 1978

NATURE OF ACTION: After sending a messenger to another city to bring two suitcases back to him, the defendant momentarily eluded police waiting to search one of the suitcases under a warrant obtained as a result of an airport security guard's tip. The defendant was later arrested and charged with possession of a controlled substance with an intent to deliver.

SUPERIOR COURT: The Superior Court

for Yakima County, No. 19092, Blaine Hopp, Jr., J., on June 11, 1976, entered a judgment on a verdict of guilty.

COURT OF APPEALS: Holding that probable cause existed to support the issuance of the search warrant and finding that the trial was properly conducted, the court affirms the judgment.

LAWRENCE L. SHAFER and SHAFER, MITCHELL & MOEN, for appellant.

JEFFREY C. SULLIVAN, PROSECUTING ATTORNEY, and ROBERT N. HACKETT, JR., DEPUTY, for respondent.

GREEN, J.--Defendant was convicted of unlawful possession of more than 40 grams of marijuana with intent to deliver in violation of RCW 69.50.401(a). He appeals.

Four issues are presented: (1) Was the affidavit sufficient to support the issuance of a search warrant? (2) Was it error to deny defendant's request for

compulsory process to secure attendance of certain out-of-State witnesses at the suppression hearing? (3) Was an item not mentioned in the search warrant properly seized and admitted in evidence? and (4) Was the issue of defendant's possession of marijuana properly submitted to the jury? We affirm.

From the evidence presented, the jury could have found that on February 3, 1975, defendant approached Kevin Hrvatin at his home in Ellensburg. He asked Hrvatin to fly to Tucson, Arizona, at defendant's expense to pick up some suitcases allegedly containing leather and jewelry. Hrvatin agreed, receiving round-trip airline tickets and spending money. The next morning, defendant drove Hrvatin to the Yakima airport and gave him two large suitcases that appeared to be empty. When Hrvatin arrived in Tucson that afternoon, he was met by a man who

exchanged the two suitcases for two other full suitcases which Hrvatin took on his return to Yakima that evening.

Upon Hrvatin's arrival at the Yakima airport, he was met by the defendant and a young woman. After exchanging pleasantries, defendant said, "I'll go around and get the truck, and why don't you grab the suitcases." After Hrvatin and the young woman picked up the suitcases, they were apprehended by police officers as they approached the terminal exit doors. Defendant, who was about to reenter the terminal, observed the occurrence, turned around, and jumped into his car. An airport security guard pursued him and despite commands to stop, defendant sped from the parking lot. He was apprehended the next day.

Meanwhile, police officers took Hrvatin, the young woman and the suitcases to a room in the terminal where

they opened the suitcase which was described in the search warrant. Inside they found 15 "kilo" bricks of a substance they recognized to be marijuana. Thereupon, they opened the second suitcase which was not described in the warrant and found similar contents. On this evidence, defendant was charged and convicted of possession of marijuana with intent to deliver.

First, defendant contends the search warrant was improperly issued because the affidavit was insufficient to establish probable cause that criminal activity was occurring. He argues that, at best, the affidavit contains nothing more than a mere declaration of suspicion and belief; and therefore, he contends it was error to admit into evidence the contents of the two suitcases. We disagree.

The search warrant issued was based solely upon the affidavit of Officer Vern Riddle of the Yakima Police Department and reads in pertinent part:

> "That your affiant believes that he has probable cause to believe that a controlled substance, marijuana, is being secreted within a black Samsonite brand suitcase, bearing Hughes Air West luggage tag number 03-62-52, which will arrive at the Yakima Airport at approximately 9:06 p.m. on Feb. 4, 1975.
>
> "The suitcase, black in color, is approximately 2-1/2 feet long, 6 inches thick, and 18" high. It contains no identification except the above mentioned tag number.
>
> "Said probable cause is based upon a telephone conservation [sic] had with one Lester Brown, who identified himself as a member of

the airport security police at Tucson International Airport, Tucson, Arizona, on February 4, 1975 at approximately 4:30 p.m.

> "Officer Brown related that he has been a member of the security force for four years, and is experienced in checking and inspecting baggage for controlled substances.
>
> "That on this date at approximately 3:35 p.m. MST, Officer Brown observed the above described bag fall from a conveyor belt. The bag emitted a significant amount of powder, believed by Officer Brown to be talcum powder. Inspection of the bag disclosed that it was heavy, approximately forty pounds, and did not appear to contain clothes.
>
> "Officer Brown stated that in his experience marijuana is very commonly transported in suitcases which contain

loose talcum powder which distracts dogs from smelling the marijuana because it (the powder) gets into the nostrils of the dog.

"Officer Brown stated that the bag appeared to contain a solid object."

It is, of course, well established that an affidavit must contain more than a mere declaration of suspicion and belief; it must contain sufficient reliable underlying facts or circumstances to allow a magistrate to find probable cause to believe a crime has been committed. United States v. Harris, 403 U.S. 573, 21 L. Ed. 2d 723, 91 S. Ct. 2075 (1971); Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969); United States v. Ventresca, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S.Ct. 741 (1965); Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509

(1964); State v. Patterson, 83 Wn.2d 49, 515 P.2d 496 (1973); State v. Biggs, 16 Wn. App. 221, 556 P.2d 247 (1976). In United States v. Ventresco, supra at 746, the court prescribed the standard for determining the adequacy of information contained in affidavits:

"If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will

tend to discourage police officers from submitting their evidence to a judicial officer before acting.

". . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be

largely determined by the preference to be accorded to warrants."

(Italics ours.) Accord, State v. Patterson, supra at 54. Our court in State v. Harris, 12 Wn. App. 481, 485, 530 P.2d 646 rev. denied, 85 Wn.2d 1010 (1975), also noted:

"As our State Supreme Court perceptively observed while upholding an arrest for probable cause in State v. Poe, 74 Wn.2d 425, 429, 445 P.2d 196 (1968):

'An officer of a narcotics detail may find probable cause in activities of a suspect and in the appearance of paraphernalia or physical characteristics which to the eye of a layman could be without significance. His action should not, therefore, be measured by what might or might not be probable cause to an untrained

civilian passerby, but by a standard appropriate for a reasonable, cautious, and prudent narcotics officer under the circumstances of the moment.'

"(Citation omitted.) Similarly, magistrates issuing a search warrant may draw commonsense inferences from the facts and circumstances contained in a supporting affidavit, and their determinations of probable cause will be treated with deference by reviewing courts. State v. Patterson, supra; State v. Hodge, 5 Wn. App. 639, 390 P.2d 126 (1971)."

(Italics ours.) See State v. Cabigas, 5 Wn.App. 183, 185, 486 P.2d 1139 (1971).

Defendant argues that the affidavit merely discloses "innocent seeming activity and data" because talcum powder is not, in itself, indicative of the presence of marijuana and there is

nothing in the affidavit to support the bare allegation that it is used to distract dogs from smelling marijuana.[1] We are not persuaded by this argument.

[1]Although defendant argued at the suppression hearing that the affidavit does not establish probable cause because the reliability of Mr. Brown is not set forth, this issue is not raised on appeal and is apparently conceded. This is understandable because Mr. Brown was an identified citizen informant and an eyewitness to the facts. His credibility is thereby established. J. Cook, Constitutional Rights of the Accused, PRETRIAL RIGHTS, § 37 at 238, cases cited in n. 15 (1972). See also, United States v. Ventresca, supra at 747, where the court held that "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." While the record does not establish Mr. Brown to be a fellow officer in a technical sense, he was a security officer charged with the duty of detecting controlled substances in bag - gage passing through the Tucson Airport. Consequently, he was not only a citizen informer, but was also acting in a quasi-law enforcement capacity to the extent of lending credence to the information he transmitted to Officer Riddle in Yakima.

The affidavit contains information that Lester Brown of the Tucson Airport security police was experienced in checking and inspecting baggage for controlled substances and that in his experience marijuana is commonly transported in suitcases containing loose talcum powder to distract dogs from detecting it. While the affidavit might have been more specific in delineating Mr. Brown's experience with respect to his statement regarding this commonly known use of talcum powder, the failure to do so is not fatal in the circumstances of this case.

It is, of course, common knowledge in today's society that dogs are used to "sniff-out" the presence of marijuana in luggage to be transported by air. Likewise, it is apparent to law enforcement people that those engaged in such transportation have sought to frustrate the

activity of dogs by the use of talcum powder. That such use is common knowledge to those engaged in detecting the presence of controlled substances was made evident by Justice Burger, writing in United States v. Chadwick, ____ U.S. _____, 53 L. Ed 2 538, 97 S. Ct. 2476 (1977). Although divided 7 to 2 on the question of whether a trunk emitting talcum powder could be searched incident to arrest, the court was unanimous in recognizing that the trunk was unusually heavy for its size and "was leaking talcum powder, a substance often used to mark the odor of marihuana or hashish." Moreover, the opinion indicates that the Court of Appeals for the first circuit found there was "probable cause to believe the footlocker [trunk] contained a controlled substance when they opened it." The Supreme Court, in effect, affirmed

this determination sub silentio, but reversed on the basis that the trunk could not be searched incident to arrest. The error was in the failure of the officers to obtain a search warrant. Likewise, in United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974), a border patrolman confirmed the common use of talcum powder to disguise the presence of marijuana. There the defendant conceded probable cause. It is apparent from these brief observations that those engaged in detection of controlled substances are aware that the presence of talcum powder usually indicates the presence of marijuana in the context of the circumstances of this case.

Viewing the totality of the facts contained in the affidavit in light of the standards set forth above, we find it sufficient to support the issuance

of the search warrant based on the magistrate's determination of probable cause. Therefore, the trial court did not err in refusing to suppress the evidence obtained from the search pursuant to that warrant.

Second, defendant contends the court erred in refusing to grant a continuance and compulsory process to secure the attendance at the suppression hearing of witnesses from Tucson. We find no error.

The gist of defendant's offer of proof in support of these motions was to secure evidence, if available, that Mr. Brown had in fact opened the suitcase in Tucson, discovering its contents. This contention is based upon the claim that the suitcase described in the search warrant was locked when Mr. Hrvatin delivered it to the airline in Tucson, but was unlocked at the time it arrived at the Yakima airport. In essence, defendant was seeking to

discover evidence that would show there was an illegal search of some kind at the Tucson Airport.

The difficulty with this position is that there is no claim that Officer Riddle misrepresented any fact in his affidavit. Therefore, defendant's contention must fail for the reasons stated in State v. Goodlow, 11 Wn. App. 533, 535-36, 523 P.2d 1204, rev. denied, 84 Wn.2d 1012 (1974), where the court said:

> "The record before us reveals that the defense offered to show that the information given by an undisclosed informant to the affiant police officer was false or materially inaccurate, but failed to allege or make a sufficient showing that: (1) there was any misrepresentation by the police officer of a material fact, or (2) there was an intentional misrepresentation by the police officer,

> whether or not material. In the absence of such a showing, the trial court did not err in rejecting the offer of proof. The affidavit need only establish probable cause for making further police inquiry. It is only the probability of criminal activity and not a prima facie showing of it which represents the standard of probable cause."

Further, the denial of the motion for a continuance to secure out-of-state witnesses rested in the discretion of the trial court. State v. Edwards, 68 Wn.2d 246, 412 P.2d 747 (1966). We find no abuse of discretion in the circumstances of this case.

Third, error is assigned to admission of the contents of the second suitcase which was not mentioned in the search warrant. Defendant contends the search was illegal as no consent was given, it

was not incident to an arrest, and the contents were not in plain view. We find the court properly admitted the evidence as incident to a lawful arrest. While defendant might argue that only a detention of Mr. Hrvatin and the young woman occurred prior to the search of the first suitcase described in the warrant, it is clear that when the marijuana was discovered therein they were under arrest and were not free to go. One is under arrest from the moment he is not free to go. At that point, the search of the second suitcase in the custody of the two parties was proper. See State v. Birdwell, 6 Wn.App. 284, 492 P.2d 249 (1972), rev. denied, 80 Wn.2d 1009 (1972).

Finally, defendant contents the evidence was insufficient to show actual or constructive possession of the suitcases or knowledge of the contents. Consequently, he argues that the court

erred in failing to dismiss the charge and in submitting the question of possession to the jury. We find no error.

Constructive possession, dominion and control over the two suitcases and the contents, by defendant may be shown by circumstantial evidence. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969); see State v. Gosby, 85 Wn.2d 758, 539 P. 2d 680 (1975). The evidence is clear that the defendant requested Mr. Hrvatin to travel to Tucson to pick up the suitcases and transport them to Yakima, paying all of the expenses. Defendant took Hrvatin to the airport and met him on the return flight. Mr. Hrvatin had no interest in the suitcases other than to bring them back to Yakima and deliver them to defendant. While defendant claims that all he knew was that the suitcases contained leather and jewelry, the jury was entitled to judge the credibility of that

testimony. Therefore, the issue of constructive possession was supported by the evidence and properly submitted to the jury. State v. Isom, 18 Wn. App. 62, 567 P.2d 246 (1977).

Affirmed.

GREEN, J.

WE CONCUR: